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# WORKING PAPERS

LAW 2016/03

Department of Law

European Regulatory Private Law Project (ERC-ERPL-17)

European Research Council (ERC) Grant

## The Apple case today: Factual and legal assessment

Mateja Durovic



European Research Council  
Established by the European Commission



European University Institute  
**Department of Law**

“European Regulatory Private Law” Project

European Research Council (ERC) Grant

## **THE APPLE CASE TODAY: FACTUAL AND LEGAL ASSESSMENT**

Mateja Durovic

EUI Working Paper **LAW** 2016/03  
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## **European Regulatory Private Law: The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation (ERPL)**

A 60 month European Research Council grant has been awarded to Prof. Hans-Wolfgang Micklitz for the project “European Regulatory Private Law: the Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation” (ERPL).

The focus of the socio-legal project lies in the search for a normative model which could shape a self-sufficient European private legal order in its interaction with national private law systems. The project aims at a new-orientation of the structures and methods of European private law based on its transformation from autonomy to functionalism in competition and regulation. It suggests the emergence of a self-sufficient European private law, composed of three different layers (1) the sectorial substance of ERPL, (2) the general principles – provisionally termed competitive contract law – and (3) common principles of civil law. It elaborates on the interaction between ERPL and national private law systems around four normative models: (1) intrusion and substitution, (2) conflict and resistance, (3) hybridisation and (4) convergence. It analyses the new order of values, enshrined in the concept of access justice (*Zugangsgerechtigkeit*).

*The research leading to these results has received funding from the European Research Council under the European Union’s Seventh Framework Programme (FP/2007–2013) / ERC Grant Agreement n. [269722].*



## **Author's Contact Details**

Mateja Durovic  
Assistant Professor  
School of Law  
City University of Hong Kong  
Tat Chee Avenue  
Kowloon Tong Hong  
mdurovic@cityu.edu.hk

## **Abstract**

Enforcement represents the most challenging task of consumer law. In the European Union, consumers are typically faced with numerous problems when it comes to protection of their consumer rights which have been infringed. This Paper examines the Apple case as one of the most successful examples of enforcement of EU consumer law that took place in a dozen of EU Member States. Apple was found to have breached a number of the provisions of EU consumer law that deal with the issues of legal and commercial guarantee and the fairness of commercial practices and contract terms. The Apple case may be used as a model of a successful, pan-European enforcement of consumer law.

## **Keywords**

consumer, commercial practices, enforcement, EU Law, collective redress



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## Introduction

The present report on the Apple case provides the results of the examination and legal assessment performed of the national official websites of the Apple company in a number of countries which are Member States of the European Union. Hence, this report represents a follow-up to the pan-European battle of consumers against Apple throughout a dozen of European countries that was initiated in March 2012.<sup>1</sup> The main purpose of the executed research is the analysis of the Apple websites and their compliance with applicable consumer legislation, and thus the verification of whether Apple has eventually aligned its business activities with the requirements set up by EU Consumer Law.

It is important to note that this report does not expand on the legality of all elements of Apple's websites in these countries and all of its commercial practices towards consumers, but only on those related to the legal and commercial guarantee of Apple products. In that context, the report pays particular attention to the information provided by Apple on its official websites in relation to the **Apple One-Year Limited Warranty** ("OYLW") and the **AppleCare Protection Plan** ("ACPP"). The report likewise addresses the statutory rules on mandatory legal guarantee set up by the rules of Directive 1999/44/EC on consumer sales, as transposed and developed by the national legal systems of each of the examined Member States. Moreover, the report does not cover all Member States of the European Union, but limits itself to the following fourteen countries: Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, and the United Kingdom. The majority of these countries are those where diverse forms of actions against Apple for the breach of consumer laws were commenced in 2012.

The present report was prepared for BEUC, the European Consumer Organisation, as the beneficiary, by the legal expert Dr. Mateja Durovic LLM. The author is an Assistant Professor at the School of Law of the City University of Hong Kong, and is specialised in the area of European law on unfair commercial practices and consumer contract law. The author has been involved in the Apple case on the side of BEUC from the very beginning, i.e. as of the Lisbon meeting in March 2012. Since then, he has constantly closely followed the subsequent development of the pan-European actions against Apple.

This report, as it stands today, is based exclusively on the performed desk research and legal assessment of publicly available online information and documentation obtainable on Apple's official websites and the websites of other companies to which, in some cases, consumers are directed by the Apple website. All website pages were accessed in their original languages, the content of which was understood either as a consequence of the author's knowledge of a particular language or by using Google Translator for a translation of the text.

## Factual assessment of the state of play of the Apple websites

### *Three types of guarantees*

As an essentially important starting observation, a distinction needs to be made between three different forms of guarantee offered to consumers by Apple.<sup>2</sup> The explanation of this distinction is fundamental since a consumer needs to be provided with the right information in an adequate manner in order to

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<sup>1</sup> See: [http://www.cojef-project.eu/IMG/pdf/BEUC\\_PR\\_Apple.pdf](http://www.cojef-project.eu/IMG/pdf/BEUC_PR_Apple.pdf)

<sup>2</sup> These guarantees are offered to all (potential) buyers of Apple' products, irrespectively of whether they are consumer or not, but for the purpose of this Report I am limiting my examination only to the consumer law approach towards these guarantees.

understand, firstly, the parallel existence of these three types of guarantees and the rights relating thereto and, secondly, the content and meaning of each of them. A correct fulfillment of this duty of information is a necessary prerequisite for the legality of Apple's business activities. However, the actual failure of Apple to do so in the past was the principal cause of the multinational actions taken against it in a dozen of European countries, which were confirmed as being justified by the national courts or other competent authorities.

The **first type of guarantee** offered when purchasing an Apple product is a mandatory, so-called "legal guarantee" established through the mandatory provisions of national consumer legislation on conformity obligation of acquired goods. These provisions represent transposed and further developed provisions contained in the European Directive 1999/44/EC on sales of consumer goods and associated guarantees ("Directive 1999/44/EC on consumer sales"). This directive has established a minimum two-year period of conformity that has to be observed with any goods sold to consumers.<sup>3</sup> The national courts of Member States of the European Union are required to apply *ex officio* the provisions of this directive and protect consumers even in cases when consumers have not relied on the rules of Directive 1999/44/EC on consumer sales.<sup>4</sup>

However, Directive 1999/44/EC on consumer sales is a directive that requires only a minimum harmonisation from Member States. Accordingly, European countries are allowed to provide an advanced level of protection if they are willing to do so. This means that Member States are also free to introduce longer periods of conformity and, as a result, some of the Member States have profited from this possibility by introducing a longer period of conformity obligation. Consequently, when it comes to the period of legal guarantee, there exists a difference between Member States, yet none of them offers a period shorter than two years. This type of guarantee is of mandatory legal nature and thus shall always apply, i.e. it may in no manner be derogated or modified.<sup>5</sup> Member States shall always ensure that consumers may enforce their rights protected by the legal guarantee in an efficient manner.<sup>6</sup> Moreover, traders must never present it as a specific feature of their product.<sup>7</sup>

The **second type** of guarantee is the one brought to consumers by the OYLW as a form of commercial guarantee offered by Apple.<sup>8</sup> The OYLW is a right granted to consumers not through an imperative legal regime of consumer protection, but voluntarily by Apple for the period of one year. Consumers are not asked to provide any compensation to obtain this right, but it is granted automatically, free of charge, to any consumer who has acquired an Apple product.

Despite the fact that compensation is not demanded for acquiring this right, the examination of the OYLW falls again under legality assessment since the provision of this right typically represents one of the features affecting the consumer's decision-making process. This is particularly true when the Apple products are compared with similar products offered by competitors. In other words, this form of guarantee, irrespectively of its free-of-charge character, represents an element of a trader's commercial offer, and thus possesses the ability to have an impact on the consumer's economic decision and even may mislead him.<sup>9</sup>

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<sup>3</sup> Article 5 of Directive 1999/44/EC on consumer sales.

<sup>4</sup> Case C-497/13 *Froukje Faber v Autobedrijf Hazet Ochten BV* (2015) ECR I-0000.

<sup>5</sup> Article 7 of Directive 1999/44/EC on consumer sales.

<sup>6</sup> Case C-32/12 *Soledad Duarte Hueros v Autociba SA and Automóviles Citroën España SA* (2013) ECR I-0000 at [30].

<sup>7</sup> Article 5(5) and point 10 of Annex I of Directive 2005/29/EC on unfair commercial practices.

<sup>8</sup> Commercial guarantee as defined by Article 2(1)(14) of Directive 2011/83/EU on consumer rights.

<sup>9</sup> G Howells, HW Micklitz and T Wilhelmsson, *European Fair Trading Law. The Unfair Commercial Practices Directive* (Ashgate 2006), 144.

The **third type** of guarantee provided is the ACP, which just as the OYLW, represents a form of commercial guarantee offered to consumers who acquire an Apple product as an accessory product. The ACP is an option, but unlike in the case of the OYLW, consumers have to pay for it. Therefore, a consumer has the choice to either acquire the ACP at the moment when he buys a particular Apple product or within a period of time once he has bought a product. It provides a guarantee that lasts longer than the OYLW, i.e. for the period of two or three years, depending on the specific Apple product that it is supposed to cover. The ACP is typically advertised by Apple as providing not only a longer, but also a wider scope of protection than the OYLW. Apple has recently also started promoting its new version of the ACP, the AppleCare +, which is now being developed.

As pointed out above, the legality of Apple business activities in relation to the offered guarantees depends on the fact whether it correctly provides the consumer with all relevant pieces of information. These pieces of information need to ensure that the consumer fully and properly understands the existence of these three guarantees, their mutual correlation, comparison and content.

### *Presentation of guarantee rights: General observations*

In the case of the Apple webpages in all of the examined countries, as they stand today, the ACP is offered as one of the additional products that consumer may buy with the acquired product (MacPro, MacAir, Ipad, Ipod, etc.). The ACP is offered to the consumer on the first page on which the information on guarantee shows. Further information is provided once the consumer decides and opts to buy an Apple product. Next to the photo of the ACP (white square with a red apple inside), a **description of the product** is provided, typically in **three paragraphs** in all of the countries, though with some exceptions (Italy). The ACP is offered to consumers as one of the accessory products once a consumer has opted to buy an Apple product online. On this page, other accessory products are also displayed, i.e. the ACP is offered among diverse Service and Support products. Next to the recognisable symbol of the ACP, a description of the ACP is provided in three paragraphs. On that page, no information about the existence of a consumer legal guarantee is ever mentioned.

The **first paragraph** points out that a consumer who decides to buy the product gets the technical support plan for the questions related to a wide set of Apple product related issues (Apple Hardware, OS X...). It also points out that the consumer receives such an Apple service worldwide.

The **second paragraph** describes the means how the consumer gets enrolled in the ACP, in particular that it is an easy and not a demanding process. This paragraph is present in all countries with the exception of Italy. It is not clear why it has been omitted in Italy.

The **third paragraph** describes that the ACP benefits are provided in addition to the consumer's statutory rights prescribed by the law regarding replacement or repair of goods in case of lack of conformity, i.e. the legal guarantee. At the end of this paragraph, the consumer is offered the possibility to open another webpage where s/he is provided with the additional information regarding the guarantee. That last webpage is particularly important from the perspective of this report since it is aimed to provide further information on legal and commercial guarantees to consumers who are considering the purchase of an Apple product.

After all three paragraphs, the consumer is offered to open yet another webpage by clicking on the button "learn more" where the technical details about the ACP, i.e. the products it covers, are given. However, the consumer does not receive the information about his legal guarantee in the form of general information, but only as part of the information provided with the description of the ACP. Similarly, the information on the consumer's mandatory right of withdrawal in case of distance contracts, i.e. contracts concluded online, is also missing.<sup>10</sup>

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<sup>10</sup> Article 9 of Directive 2011/83/EU on consumer rights.

The examination of the national websites has shown that further details on legal guarantees and other statutory rights are available on a separate webpage, which consumers may open if they decide to look for additional information, and provided in two forms: as **a grid** (a table) or in web form, **as a webpage**, that starts with the explanation of consumer rights on conformity of goods followed by the standard text of relevant provisions of the national legislation of a particular country. Those are the two approaches that Apple has used without exception. It is not clear on what the selection criteria have been based, i.e. why a table grid has been used in some countries while in others there is a webpage combining the explanation of conformity rules and the provisions of the text of the national legislation.

### ***The disclaimed diagram with charts***

The formerly used diagram with charts providing a visual presentation of the two commercial guarantee periods and a comparison between the OYLW and the ACPP has been removed from all national websites with the exception of Luxembourg and Greece. In the case of Luxembourg, that is the official website of Apple through which direct online acquisition of Apple products is possible, whereas in the case of Greece this chart appears on the website of the official reseller to which a consumer is directed from the official Apple website in order to acquire an Apple product. The charts existed in the examined countries before the action against Apple was initiated and it was found to be misleading for consumers, as a result of which Apple was required to remove it.<sup>11</sup>

In the context of the observation made in Greece and the charts being present on the website of the official resellers, it needs to be underlined that Apple products cannot be purchased directly online through the official Apple webpage in all of the assessed countries. Such a possibility exists in Belgium, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain and the UK where consumers can purchase an Apple product directly from the official website. However, in Slovenia, Romania and Greece, there is no direct online sale of Apple products through the official Apple website, but consumers are directed to the website of distributors and given the physical addresses of their stores.

In the following part, the particularities of each of the fourteen examined countries will be noted.

### ***The United Kingdom***

On the Apple website aimed at the British market, the standard three paragraphs are indicated. What is specific about this national website is that the benefits provided by the ACPP are given in addition to the consumer's statutory rights prescribed by English law on free-of-charge replacement or repair of goods in case of lack of conformity. However, it is pointed out that during this period of six years various factors, without being further explained, may have an impact on the consumer's eligibility to use these remedies.

In the case of Britain when consumers click on the button ('click here') they first get to a text with some information on Apple products and consumer law, starting with the basic rights and remedies offered to consumers in case of lack of conformity. The different time periods are identified depending on the applicable law: in case of England and Wales, that period lasts six years, and in case of Scotland, it lasts five years.

The following paragraph says that consumers who buy an Apple product will also automatically receive the OYLW without providing any explanation about its benefits in addition to the rules of English or Scottish law. Then, it is pointed out that consumers may obtain additional rights through the acquisition of the ACPP or AppleCare+. The AppleCare+ is defined in footnote 1 as "*an optional*

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<sup>11</sup> see, e.g. Decision number 23634 of the AGCM of 6 June 2012, the decision of the Italian authority in Apple case.

*insurance product covering the risk of accidental damage to your iPad, iPhone or iPod, battery depletion and the need for technical assistance*". Subsequently, it is pointed out that non-Apple products purchased from Apple do not fall under the ACPP, but only under the statutory rights.

These pieces of information are followed by a table grid containing three columns and six rows. The first column contains certain information on the rights under the applicable law in the UK, the second column, under the OYLW, and, the third column, under the ACPP. Six elements of Apple's offer which represent the six rows are then explained in each of these three columns. The first row deals with the claim period, which is five (Scotland) or six years (England and Wales) in case of statutory rights, one year in case of the OYLW, and 2 or 3 years (depending on the product) in the case of the ACPP.

The second row contains information regarding the existence of remuneration that is paid only in case of the ACPP, whereas the OYLW is offered free of charge.

The third row deals with the question of how to make a claim. In case of the statutory rights, it is indicated that consumers should contact the seller, whereas in case of remaining guarantees the consumer is required to call the Apple Support or pay a visit to an Apple Retail store or an authorised Apple service provider.

The fourth row includes the repair and replacement options: in case of statutory rights consumers should contact the seller for details, whereas in case of the OYLW and the ACPP, a Carry-in or postal service is indicated.

The fifth row points out that repair or replacement outside the country of purchase is possible in case of the OYLW and the ACPP, and that in case of their statutory rights, consumers should contact the seller.

Eventually, the sixth row provides the information regarding telephone support: in case of statutory rights, consumers should contact the seller; in case of the OYLW, ninety days as of the date of purchase are indicated and in case of the ACPP up to two or three years, depending on the product.

Below this table grid, it is pointed out that the summary is subject to full terms and conditions which consumers may access via a given link. Clicking on the first option, <http://www.apple.com/legal/warranty/>, consumers are directed to a webpage where it is repeated again that Apple offers all the rights in addition to the statutory rights and that consumers may obtain further information by clicking on a separate button. By doing so, the following webpage that opens shows the map of the World where consumers can choose their region from different areas in the world. When clicking on the map of Europe, consumers are presented with the flags of the majority of the European countries which provide additional information on guarantee rights. In case of the UK flag, consumers open a new webpage, which is the same as the one with the table grid.

At the end, a summary of basic rights in relation to conformity under statutory rights in the UK is provided.

#### **AppleCare Protection Plan**

For up to three years from your computer's original purchase date, the AppleCare Protection Plan gives you direct, one-stop access to Apple's award-winning telephone technical support for questions about Apple hardware, OS X, iLife, and iWork. And you get local Apple hardware service around the world (1)

We've even made it easy to enroll. In fact, you don't really have to do anything. When you purchase the AppleCare Protection Plan with a new Mac, you'll be automatically registered in the plan. Shortly

after your new Mac ships, we will mail you an AppleCare Welcome Packet, which includes your Proof of Coverage, as well as a Getting Started Guide with plan terms and conditions.

AppleCare Protection Plan benefits are in addition to a consumer's right to a free of charge repair or replacement, by the seller, of goods which do not conform with the contract of sale. Under English law, consumers have up to six years from the date of delivery to exercise their rights however, various factors may impact your eligibility to receive these remedies. For more details, click here.

[Learn more](#)

### ***Italy***

In Italy, only paragraphs 1 and 3 from the standard text are given. What is missing is the description of how a consumer can get enrolled in the ACPD and in particular that it is an easy and not a demanding process.

After these two paragraphs, consumers may open another website page which provides information regarding the Italian Consumer Code rules on conformity, i.e. an explanation of the rules and a copy of the provision from the Code (articles 128-135).<sup>12</sup> Subsequently and contrary to the example of the UK, consumers are not provided with the table grid, but rather with a new webpage.

This webpage first gives an explanation of what lack of conformity under Consumer Code means. This is done by posing questions and providing answers. In the following, it is explained what consumers should do in case of a defective product that has been purchased online. As a third step, it is explained that consumers should bear the costs in case the defect of the product does not fall under the scope of Consumer Code. The aim seems to be to explain to consumers how the protection functions in practice. However, neither explanations of the OYLW or the ACPD are given nor their comparative advantages in comparison to the legal guarantee.

In the following, the text of the Italian Consumer Code and its provisions is provided that regulate the right of consumers to conformity of acquired goods, as transposed and developed provisions contained in Directive 1999/44/EC on consumer sales.

On the Italian website, the fact that the ACPD offers a telephone technical support is particularly advertised.<sup>13</sup> It is also pointed out that the ACPD provides the rights in addition to those prescribed by the Italian Consumer Code, without clarifying what these supplementary rights are.

#### **AppleCare Protection Plan**

Per tre anni dalla data di acquisto originale del tuo computer, AppleCare Protection Plan ti offre accesso telefonico diretto agli esperti del supporto tecnico Apple, pronti a rispondere alle tue domande sull'hardware Apple, OS X, iLife e iWork. E quando viaggi nel mondo potrai contare sull'assistenza hardware Apple in loco(1) per il tuo Mac, con copertura di componenti e manodopera.

I vantaggi di AppleCare Protection Plan si aggiungono alla garanzia biennale del venditore prevista dalla normativa italiana a tutela del consumatore. Ai sensi del Codice del Consumo, i consumatori

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<sup>12</sup>[http://images.apple.com/it/legal/warranty/Garanzia\\_legale\\_del\\_Venditore.pdf](http://images.apple.com/it/legal/warranty/Garanzia_legale_del_Venditore.pdf)

<sup>13</sup> <http://store.apple.com/it/product/MF126T/A/applecare-protection-plan-per-macbook-air-13-macbook-pro>



hanno diritto a ottenere a titolo gratuito dal rivenditore la riparazione o la sostituzione dei prodotti che presentano un difetto di conformità entro 24 mesi dalla consegna. Per maggiori dettagli, clicca qui.

Per saperne di più

### ***Spain***

In Spain, the three standard paragraphs are available on the webpage which opens once a consumer decides to purchase an Apple product.

In Spain, the same methodology as the one in Italy is used to explain the legal guarantee. Accordingly, the first part of the newly opened webpage deals with the explanation of consumer rights to conformity. However, this explanation seems to be more detailed and exhaustive than in Italy. It is written in bold letters that the guarantees offered by Apple do not in any way preclude the legal guarantee. However, again, no comparative advantages of the OYLW or the ACPP have been provided.

The explanation is followed by a full text of articles 114-124 of the Spanish Law on Consumer Protection that deals with the right to conformity. It is pointed out in bold letters that guarantees provided by Apple do not in any way substitute the legal guarantee, but rather complete it.<sup>14</sup>

#### **AppleCare Protection Plan**

Accede directamente y desde un único lugar a nuestro premiado servicio de asistencia técnica telefónica para solucionar cualquier duda sobre el hardware de Apple, OS X, iLife y iWork durante tres años a partir de la fecha de compra del ordenador. Además puedes pedir una reparación cuando estés fuera de tu país. (1)

Hemos simplificado el proceso para que no te preocupes de nada. Si contratas AppleCare Protection Plan al comprar un Mac, el servicio se da de alta automáticamente sin que tengas que registrarte. En cuanto el Mac salga de nuestro almacén, te enviaremos por correo postal un paquete de bienvenida a AppleCare con la documentación de la cobertura, una guía de introducción y los términos y condiciones.

Las ventajas del AppleCare Protection Plan se suman a tus derechos como consumidor. Según la Ley General para la Defensa de los Consumidores y Usuarios española, los consumidores tienen, entre otros, el derecho a obtener del vendedor la reparación o sustitución gratuita de los productos que manifiesten una falta de conformidad con el contrato de compraventa durante los dos años posteriores a la entrega. Además, el consumidor puede dirigirse contra el fabricante cuando resulte imposible o suponga una carga excesiva reclamar directamente al vendedor. Si quieres más información, haz clic aquí.

Más información

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<sup>14</sup> [https://images.apple.com/es/legal/statutory-warranty/Spain\\_Statutory\\_Warranty.pdf](https://images.apple.com/es/legal/statutory-warranty/Spain_Statutory_Warranty.pdf)

## **Belgium**

In Belgium, it is possible to notice that the provided three standard paragraphs materially differ from the previously examined examples in the UK, Italy and Spain. The text is offered in two versions: French and Dutch. In case of the Belgian national website, the first paragraph identifies that under Belgian law, consumers have the right to conformity of acquired goods within the period of two years. The second paragraph mentions the OYLW. The third paragraph describes the APCC referring to the telephone support and additional guarantee rights given to consumers by the ACPP. In the case of the Belgian website, consumers may obtain additional information about each of the guarantees not only after the third paragraph, but also after the first and the second. However, a clear comparative presentation is still missing.

In the additional document that is opened after a consumer chooses to click on a link at the end of the third paragraph, a separate webpage is provided, the same as in case of Italy or Spain, indicating the rules on conformity, i.e. the legal guarantee. These rules are first explained, but without comparing them to the OYLW or the ACPP. Then follows the text of the part of the Belgian Civil Code on conformity rules, in particular articles 1641 to 1649 octies.

### **AppleCare Protection Plan**

En Belgique, les consommateurs ont droit à une réparation ou à un remplacement sans frais, par le vendeur, des produits non conformes au contrat de vente dans les deux ans suivant leur livraison, conformément au Code civil belge. Pour en savoir plus, cliquez ici.

Votre Mac est également assorti d'une assistance technique téléphonique gratuite de 90 jours et d'une garantie limitée d'un an offerte par Apple. Pour en savoir plus sur le service Apple pour votre Mac, cliquez ici.

Souscrivez l'AppleCare Protection Plan et bénéficiez de trois années d'assistance technique téléphonique assurée par des experts et d'options de garantie matérielle supplémentaires fournies par Apple. Pour en savoir plus, cliquez ici.

## **Luxembourg**

In Luxembourg, the approach is similar to Spain and Italy, however, with the addition of a chart that graphically explains the OYLW and the ACPP comparing these two forms of commercial guarantees, yet fully omitting the rules on legal guarantee. It is slightly surprising to find this chart on the Luxembourgish website bearing in mind that this chart was considered one of the most problematic elements of the Apple website (and the package of the ACPP in Apple stores) when it comes to its legality. Consequently, the chart was erased from all national official websites examined in this report through which consumers may directly purchase an Apple product online, except for the Luxembourgish website.

The additional information on guarantee is provided on a new webpage in line with the methodology used in Belgium, Spain and Italy, i.e. first an explanation of the rights related to conformity is given which is followed by the relevant provisions of Luxembourgish legislation, in particular articles starting from L.212-1 to L212-9 of the Luxembourgish Consumer Code.

### **AppleCare Protection Plan**

Pendant trois ans à compter de la date d'achat de votre ordinateur, vous bénéficiez d'un accès direct et centralisé à l'assistance téléphonique Apple, reconnue pour sa qualité, dès que vous avez la

moindre question sur le matériel Apple, OS X, iLife et iWork. Et vous bénéficiez aussi d'un service local de réparation dans le monde entier. (1).

Nous avons simplifié le processus d'inscription, de sorte que vous n'ayez rien à faire. Lorsque vous achetez l'AppleCare Protection Plan avec un nouveau Mac, vous êtes automatiquement inscrit à ce plan. Quelques jours après l'expédition de votre nouveau Mac, nous vous enverrons un paquet de bienvenue AppleCare, qui contient votre preuve de couverture, un guide de démarrage et les conditions générales du plan.

Au Luxembourg, les consommateurs ont droit à une réparation ou à un remplacement sans frais, par le vendeur, des produits non conformes au contrat de vente dans les deux ans suivant leur livraison, conformément au Code de la consommation du Luxembourg. Pour en savoir plus, cliquez ici.

En savoir plus

### ***Portugal***

In Portugal, just like in the UK and Spain, the first webpage that opens once a consumer has decided to buy an Apple product, shows the standard three paragraphs.

The next webpage that consumers may open, contains the explanation of the rules on conformity, which is then followed by the full text of the relevant articles of the Portuguese legislation on consumer protection, in particular the articles of the Law on guarantees. The same methodology is used as in Italy or Spain. No comparative advantage of the OYLW or the ACPP in relation to the legal guarantee has been provided.

### ***France***

In France, the three standard paragraphs are available as is the case in Portugal, Spain and the United Kingdom.

Subsequently, consumers may also choose to be directed to a separate webpage where, firstly, the consumer's rights to conformity are explained, and secondly, the relevant provision of the French Consumer Code (Articles L-211-4, L-211-5, and L211-12) on the lack of conformity and the French Civil Code (Articles 1641 and 1648(1)) on the hidden defects of goods are listed. The integral texts of these two pieces of legislation are presented, too.

The website also provides a detailed set of information on legal guarantee, however, without comparing it with the ACPP or the OYLW.

### **AppleCare Protection Plan**

Pendant trois ans à compter de la date d'achat de votre ordinateur, vous bénéficiez d'un accès direct et centralisé à l'assistance téléphonique Apple, reconnue pour sa qualité, dès que vous avez la moindre question sur le matériel Apple, OS X, iLife et iWork. Et vous bénéficiez aussi d'un service local de réparation dans le monde entier. (1).

Nous avons simplifié le processus d'inscription, de sorte que vous n'ayez rien à faire. Lorsque vous achetez l'AppleCare Protection Plan avec un nouveau Mac, vous êtes automatiquement inscrit à ce

plan. Quelques jours après l'expédition de votre nouveau Mac, nous vous enverrons un paquet de bienvenue AppleCare, qui contient votre preuve de couverture, un guide de démarrage et les conditions générales du plan.

En France, les consommateurs ont droit à une réparation ou à un remplacement sans frais, par le vendeur, des produits non conformes au contrat de vente dans les deux ans suivant leur livraison, conformément au Code de la consommation français. Ils peuvent aussi obtenir le remboursement d'un produit ou garder le produit et obtenir son remboursement partiel, par le vendeur ou le fabricant, dans les deux ans suivant la découverte d'un vice caché, conformément au Code civil français. Pour en savoir plus, cliquez ici.

[En savoir plus](#)

### ***Denmark***

The Danish website contains the standard three paragraphs, as is the case in the UK and Spain.

Like in the UK, the consumer is then presented with a table grid on the next webpage, consisting of three columns that contain the information on the legal guarantee and the two commercial guarantees. The first column refers to the rules on conformity as provided by the relevant Danish Law, the second one to the OYLW and the third one to the ACPP. The six rows of the table grid follow the same approach as in the UK. Interestingly, all pieces of information are provided in the English language.

#### **AppleCare Protection Plan**

For up to three years from your computer's original purchase date, the AppleCare Protection Plan gives you direct, one-stop access to Apple's award-winning telephone technical support for questions about Apple hardware, OS X, iLife, and iWork. And you get local Apple hardware service around the world (1)

We've even made it easy to enroll. In fact, you don't really have to do anything. When you purchase the AppleCare Protection Plan with a new Mac, you'll be automatically registered in the plan. Shortly after your new Mac ships, we will mail you an AppleCare Welcome Packet, which includes your Proof of Coverage, as well as a Getting Started Guide with plan terms and conditions.

AppleCare Protection Plan benefits are in addition to a consumer's right to a free of charge repair, replacement, price reduction or refund, by the seller, of goods which do not conform with the contract of sale within two years from delivery under the Danish Sale of Goods Act. For more details, [click here](#).

[Learn more](#)

### ***Germany***

In Germany, the standard three paragraphs are provided next to the picture of the ACPP.

On the following webpage that gives access to additional information on guarantees, the consumer is presented with a table grid comprising three columns, just as in the UK or Denmark. The first column refers to the provisions on conformity as established by the German Law, whereas the two other columns contain information on the OYLW and the ACPP.

In 2015, an important judgement regarding the Apple case was adopted in Germany. The Court of the First Instance adopted a decision in which it declared that sixteen components of Apple's terms and conditions in relation to consumer's guarantee, including those related to the ACPP, breached mandatory transparency rules established through the provisions of Directive 93/13/EEC on unfair contract terms. The German court pointed out that the explanation of the commercial guarantee in the terms and conditions was not sufficiently clear, so that consumers might get a wrong impression that the legal guarantee was limited by the commercial guarantee offered by Apple. Therefore, these terms were declared as null and void. The Court of Appeal of Berlin, as a second instance Court, has subsequently confirmed the decision of the Court of First Instance.

#### **AppleCare Protection Plan**

Mit dem AppleCare Protection Plan hast du bis zu drei Jahre ab Originalkaufdatum des Computers direkten Kontakt zum preisgekrönten Supportteam von Apple bei Fragen zur Apple Hardware, zu OS X, iLife und iWork. Und du kannst weltweit den Hardwareservice in Anspruch nehmen. (1)

Die Registrierung ist ganz einfach. Eigentlich musst du überhaupt nichts tun. Wenn du den AppleCare Protection Plan mit einem neuen Mac erwirbst, wird der Plan automatisch registriert. Binnen kürzester Zeit nach dem Versand des neuen Mac senden wir dir ein AppleCare Welcome Packet, das einen Deckungsnachweis sowie eine Kurzanleitung mit den Bedingungen des Plans enthält.

In Deutschland haben Verbraucher gemäß BGB innerhalb von zwei Jahren ab Übergang der Ware Anspruch auf eine kostenlose Reparatur, einen kostenlosen Austausch, einen Rabatt oder eine Rückzahlung durch den Händler, wenn das gekaufte Produkt zum Zeitpunkt des Übergangs nicht dem Kaufvertrag entspricht. Weitere Informationen unter.

Weitere Infos

#### ***The Netherlands***

In the Netherlands, the three standard paragraphs are available, as is the case in the majority of other countries.

The separate webpage that consumers may open, contains a table grid, equal to those shown in the UK, Denmark or German. The three columns of the table grid refer to the Dutch Law, the OYLW and the ACCP which in turn are further explained in the six rows of the table that represent the six categories, just as in the UK.

#### **AppleCare Protection Plan**

Tot drie jaar vanaf de aankoopdatum van je computer kun je met het AppleCare Protection Plan via een rechtstreeks telefoonnummer gebruik maken van de bekroonde technische ondersteuning van Apple en vragen stellen over de Apple hardware, OS X, iLife en iWork. Bovendien kun je overal ter

wereld terecht bij lokale Apple reparatiepunten voor hardware. (1)

Het is nu nog makkelijker om deel te nemen. Je hoeft eigenlijk helemaal niets te doen. Als je het AppleCare Protection Plan tegelijk met een nieuwe Mac koopt, word je automatisch voor het plan geregistreerd. Kort na de levering van je Mac ontvang je per e-mail een AppleCare-welkomstpakket met je dekkingsbewijs en een basishandleiding met de algemene voorwaarden.

In Nederland hebben consumenten conform het Burgerlijk Wetboek recht op gratis reparatie of vervanging door de verkopende partij van goederen die, gelet op de aard van het product en de informatie die door de verkopende partij is verstrekt, niet de eigenschappen hebben die de koper redelijkerwijs kon verwachten conform de koopovereenkomst. Voor meer informatie klik je hier.

Meer informatie

### ***Poland***

In Poland, the three standard paragraphs are displayed on the first webpage.

The following new webpage that may be opened by consumers contains the table grid, but unlike the grids in the other examined countries, it exceptionally comprises five instead of the typical six rows. What is missing is the time period during which a consumer may demand his rights (the first row). It is not clear why this information has been omitted.

The table grid refers in the first column to the Polish Consumer Law, which is followed by the regular two other columns on the OYLW and the ACPP.

#### **AppleCare Protection Plan**

AppleCare Protection Plan nawet przez trzy lata od daty zakupu komputera zapewnia bezpośredni dostęp — pod jednym adresem — do ekspertów znakomitego telefonicznego wsparcia technicznego Apple. Można zwracać się do nich z pytaniami dotyczącymi sprzętu Apple, systemu OS X oraz pakietów iLife i iWork. Poza tym plan uprawnia do korzystania z lokalnych serwisów sprzętu Apple na całym świecie. (1)

Rejestracja jest bardzo prosta. Tak naprawdę nie musisz nic robić. Jeśli kupisz plan AppleCare Protection Plan razem z nowym komputerem Mac, rejestracja w planie nastąpi automatycznie. Krótco po otrzymaniu nowego komputera Mac otrzymasz pocztą pakiet powitalny AppleCare Welcome Packet zawierający dowód ochrony, a także instrukcję Szybki start z warunkami planu.

W Polsce konsumenci mają prawo do bezpłatnej naprawy, wymiany, rabatu lub zwrotu zapłaconej kwoty przez sprzedawcę, jeśli w momencie dostawy towar nie był zgodny z zawartą umową sprzedaży. Zgodnie z polskim Kodeksem Cywilnym konsument może zgłaszać roszczenia z tego tytułu przez dwa lata od dostawy towaru. Aby uzyskać więcej informacji, kliknij tutaj.

Więcej informacji

### ***Slovenia***

In Slovenia, only the table grid with a comparative overview is available as an explanation of the ACPP, seeing that consumers do not have the option to buy directly online from the Apple website, but are directed to the resellers of Apple products.

Contrary to all previously mentioned table grids, the one provided for Slovenia refers in the first column to EU Law, and not to Slovenian law. This is followed by the regular two columns on the OYLW and the ACPP.

### ***Greece***

In Greece, like in the case of Slovenia, it is not possible to acquire Apple products directly through the Apple website.

However, the website of iSquare managed by Apple, only presents the chart with the information on the OYLW and the ACPP, just like in Luxembourg, without mentioning any comparison with the legal guarantee. The chart in question is the chart that was subject of serious criticism by numerous consumer organisations for misleading consumers.

### ***Romania***

In Romania, Apple products cannot be purchased directly through the official Apple website, but only through resellers.

For any additional information on the ACPP, consumers are directed to the UK website and the table grid provided for the British market, with the text in English and not in the Romanian language.

## **Comparison between countries and actions taken by BEUC members**

The legality of Apple's commercial practices in relation to the legal and commercial guarantees was questioned in a dozen of European countries, where consumer organisations initiated diverse forms of actions before different national institutions in charge of enforcement of consumer law. Only ten of the countries examined in this report took part in the action: Portugal, Belgium, Luxembourg, Germany, Italy, Spain, The Netherlands, Denmark, Poland, Slovenia, and Greece. No action of such kind was recorded in France, the UK and Romania.

The follow-up question is whether the performed overview of national websites may show any kind of differentiae when it comes to factual and legal assessment of each particular country as a consequence of the fact, whether or not in a country any kind of action was taken against Apple. The answer to this question seems to be rather negative, i.e. no material differences can be observed. It appears that Apple has modified its webpages and commercial practices towards consumers in all of the examined countries, irrespectively of whether an action has taken place or not. In addition to this, the fact that an action was taken in a particular country is not linked to the methods of provision of information, i.e. the table grid vs. the explanation of the rules on conformity and the text of the applicable legislation.

In that aspect, some not particularly significant observations can be made, e.g. that the table grid on the Polish website contains one row less than in other countries (five rows instead of the regular six), and that it does not provide a comparative overview of periods for which all respective guarantees provide protection. Moreover, despite the fact that Luxembourg was one of the leaders in the action against Apple, the chart which was considered one of the most problematic elements of legality of Apple's webpages, is still present on the Luxembourgish version of the official Apple website.

When it comes to the performed modifications of Apple's websites, generally speaking, it is possible to notice two major approaches taken by Apple: the first one is by presenting a comparative overview

of the three guarantees in a form of a table grid, and the second one is by explaining the rules on conformity, followed by the related text of the applicable national legislation. In that sense, it can be noted that whether an action was taken against Apple or not in a respective country, did not have any impact at all on the use of the grid or the webpage. For instance, the British website provides a grid, whereas the French one contains the explanation of the rules on conformity followed by the applicable provisions of French Consumer Code and French Civil Code.

Comparing the used options, the table grid seems to provide consumers with better information regarding the comparative advantages of the OYLW and the ACPP, which is something that is missing in case of the countries where all these pieces of information are provided on a webpage. In case of this group of countries, the explanation is exclusively focused on the meaning of the provisions of national legislation on conformity, without mentioning how this would relate to the protection of consumers through one of Apple's commercial guarantees.

## **The legal analysis**

### ***Legality of Apple's commercial practices***

The question is whether the performed comparative overview shows that Apple's commercial practices, as they stand today, meet the requirements in terms of legality. For Apple's websites to comply with legality it is most important to properly provide all relevant information related to guarantee. What is meant here is that, firstly, consumers need to be duly and adequately informed about the legal guarantee, in particular its existence and content. Secondly, that consumers are properly informed about their benefits by obtaining the OYLW and the ACPP, in addition to their rights secured through the applicable consumer legislation, i.e. the legal guarantee.

Directive 2011/83/EU on consumer rights clearly establishes as one of the universal pre-contractual information requirements, applicable to all types of consumer contracts, the obligation of the trader to remind the consumer of the existence of the legal guarantee and also of all the conditions of the commercial guarantee.<sup>15</sup> In its letter to BEUC, Apple claims that there are four elementary advantages of the ACPP in comparison to the legal guarantee: technical support, global support, claims against Apple and burden of proof. However, this information is not correctly presented and explained in all countries. Consumers need to invest serious efforts in order to search and find the relevant information and then to understand it. In addition to this, Directive 93/13/EEC on unfair contract terms imposes a mandatory transparency requirement of terms in consumer contracts which was identified as being breached by the German court's decision in the Apple case.

In line with Apple's two-fold national approach, i.e. the table grid and the webpage, first the provided grid will be legally examined below. Subsequently, the other manner of providing information will be assessed, namely the webpage with the explanation of the rules on conformity and the text of applicable legislation.

### ***Option 1: The table grid***

In the table grid which is used as the principal instrument for providing information and explanations of consumer rights in some of the examined countries (the UK, Germany, the Netherlands, Poland and Slovenia) Apple lists the advantages of the OYLW and the ACPP in comparison to the legal guarantee in form of overview.

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<sup>15</sup> Article 5(1)(e) of Directive 2011/83/EU.



**Row 1)** The first row of the table grid deals with the period of duration of the rights. In case of the statutory guarantee, for instance, it is a two-year period. However, in accordance with the minimum harmonisation nature of Directive 1999/44/EC on consumer sales, some countries have provided longer periods. For example, in English law that period lasts six years. The period for the OYLW is one year whereas in case of the ACPP, it comprises two or three years depending on a particular product. As far as the statutory rights are concerned, the moment when the period starts elapsing is the moment of delivery, whereas in case of Apple's guarantees it is the moment of purchase.

The moment of delivery is definitely a more-consumer friendly moment since the delivery always happens either at the moment of or after the purchase. Consequently, when it comes to the time period covered, the only benefit that consumers may have is the ACPP, however not for all products, but only those where the ACPP is offered for the period of three years and under the condition that a particular EU country has not profited from the minimum harmonisation character of Directive 1999/44/EC and allowed a longer period. The protection provided by the OYLW always lasts shorter, for the period of only one year.

**Row 2)** When it comes to the costs, the statutory guarantee as well as the OYLW are free. Yet, it is pointed out that the ACPP needs to be paid. However, the fact that the OYLW is free of charge is important since it may cause consumers to think that they are getting an important additional feature of a product for free, i.e. the existence of the OYLW, in particular through a misleading presentation, bears the potential risks of affecting the consumer's decision.

**Row 3)** In case of statutory guarantees, a claim can only be made towards the seller in case of statutory guarantees, whereas in case of Apple's guarantees they can be made towards Apple anywhere throughout the World. This might be an important advantage of the commercial guarantees offered by Apple since the legal guarantee is typically limited only to a seller, when it comes to a person directly responsible to consumer. In the era of highly mobile consumers, the fact that they may contact only the seller may be detrimental to consumers. However, it should not be neglected that they may also contact the seller from wherever they are, and that the seller shall also bear all the costs of fixing the lack of conformity, in relation, for example, to the costs of sending a package.

**Row 4)** Included repair or replacement options. Here, it is not clearly indicated that all the costs of repair or replacement have to be borne by the seller. It has always to be performed free of charge. If there was a lack of conformity, all of the financial burden will be on the seller.<sup>16</sup> The relevance of this row is not clearly enough presented and explained.

**Row 5)** Overseas replacement, In case of Apple's guarantees, a YES is indicated in the column. However, on the website it is pointed out that "*Apple may restrict service for iPad and iPhone to the EEA and Switzerland*".<sup>17</sup> It is not clear how, why and under what conditions and where consumers may get additional information on that. Such a provision represents a form of unfair contract term. Moreover, the usage of unfair contract terms will always represent a form of unfair commercial practices.<sup>18</sup>

**Row 6)** Telephone technical support. This is not related to lack of conformity, but rather represents a form of post-sales service. More importantly, this service is not related to Directive 1999/44/EC on consumer sales and does not have anything to do with the question of conformity.

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<sup>16</sup> Article 3(4) of Directive 1999/44/EC.

<sup>17</sup> <http://www.apple.com/uk/legal/statutory-warranty/>, footnote n 1.

<sup>18</sup> Case C-453/10 *Jana Pereničová and Vladislav Perenič v SOS financ spol. s r. o.* (2012) ECR I-0000.

### ***Option 2: The webpage with the explanation and the text of legislation***

In case of Italy, Belgium, France, Luxembourg, Portugal and Spain where Apple is providing information on the guarantees on a new webpage in the form of a text, consumers are informed about the existence of their legal guarantees and the fact that the OYLW and the ACPP do not preclude their statutory rights. However, what is missing here is the information about the consumer's advantages of the OYLW and the ACPP in comparison to the legal guarantee.

Herein, only information on conformity in the context of Directive 1999/44/EC as transposed in the national legal systems are provided. Consequently, consumers are missing the information on the comparative advantage of the OYLW and why they should buy it or get it. Consumers are given the option to go to a new webpage to obtain further information on the ACPP, but the webpage that opens just gives them the basic information about the ACPP and nothing else. What is missing is the explanation of the comparative advantages of the OYLW and the ACPP.

The webpage seems to be definitely a less-consumer friendly option than the grid since it provides less relevant information and, in addition to that, it provides the information in a less clear manner.

### ***A global picture of guarantees***

To understand this, a global picture of Apple's commercial practices has to be considered. Apple is one of the most well-known companies globally whose business activities are, of course, not limited exclusively to Europe, but include hundreds of countries situated on all continents, thus operating hundreds of diverse legal regimes. The widely spread business activities also mean that the Apple products are not made for the European market only, but also for other national and regional markets throughout the entire World. This is important since Apple offers its products world-wide, i.e. also in countries where the regulatory regime of consumer protection is typically lower than in the European Union because the European Union is the regional organisation with the most developed system of consumer protection. In non-EU countries, the OYLW and the ACPP make more sense since mandatory legal protection in that aspect is missing.

In the European Union, what seems to be promoted as the main feature of the ACPP in comparison to the imperative legal guarantee provided by consumer legislation is the existence of telephone technical support. Apple describes its telephone technical support as "*assistance with installation, assembly, basic configuration and software-related issues*."<sup>19</sup> This definition shows that the telephone technical support is rather a part of the after-sales services than of any of legal guarantee. The main purpose of this service is not related to remedying the occurrence of products defects once they have occurred, but rather of providing support in diverse contexts to the goods irrespectively of whether they are defective or not.

An average consumer while considering his or her economic decision would certainly make a distinction between a product that guarantees him rights, when an expensive products he has purchased becomes defective, on the one hand, and the acquisition of post-sales services, on the other hand, which would typically represent a less desirable product.

Moreover, a significant advantage of the ACPP in comparison to the legal guarantee is the fact that consumers may require remedy in an easier manner anywhere in the World. For instance, if a consumer buys an Apple computer in Germany and the products gets defective in the USA, the consumer may demand its repair directly in the USA, without the need to send the product back to the seller in Germany. In addition to this, it also protects consumers in case of a seller's closure since he will be able to contact directly Apple.

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<sup>19</sup> <http://www.apple.com/uk/legal/statutory-warranty/> website page last accessed on 17 October 2014, footnote n. 5

An important observation is to be made about the grid that appears on those Apple websites where grids are provided. Herein, a footnote points out that: “[i]n most EU member states, consumers may only claim for defects that were present on delivery.” This is not true since it narrows down materially the protection provided by Directive 1999/44/EC on consumer sales which grants the right to conformity not only in relation to defects that existed in the moment of delivery, but also a defect that occurred after the delivery when the defect was caused by a pre-delivery factor. In other words, according to the imperative legal regime applicable in all Member States, traders will be liable for the goods that were perfectly fine at the moment of delivery, but which became subsequently defective as the outcome of some pre-delivery cause, e.g. that a shortcoming related to the manufacturing of the product.

In the same footnote, the following sentence also appears to be unclear: “*The burden to prove that the defect (including latent defects) existed on delivery generally shifts to the consumer after the expiry of a period of 6 months from date of delivery. Examples of countries where the burden of proof does not shift include Czech Republic, Portugal and Romania.*” This wording is confusing and does not make clear that the burden of proof is *always* on the seller for the first six month in all European countries.

### ***The relation between the legal and the commercial guarantee***

The legal guarantee means the obligation of conformity as defined by Directive 1999/44/EC on consumer sales.<sup>20</sup> Accordingly, consumer goods are presumed to be in conformity with the contract if they:

1. comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
2. are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;
3. are fit for the purposes for which goods of the same type are normally used;
4. show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.<sup>21</sup>

In case of lack of conformity under consumer legislation, the consumer has the right, first to choose between the options of getting the goods repaired or replaced, and if that is not possible or it is disproportionate, the consumer is entitled to choose between the price diminution or contract termination. The remedies given to consumers in case of occurrence of the lack of conformity represent absolute rights of consumers which may not be abolished or limited in any manner.<sup>22</sup>

The explanation of the commercial guarantee was only provided through the text of Directive 2011/83/EU on consumer rights where there was made a clear distinction between the legal and commercial guarantee. Accordingly, a commercial guarantee is “*any undertaking by the trader or a producer (the guarantor) to the consumer, in addition to his legal obligation relating to the guarantee of conformity, to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the*

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<sup>20</sup> See Article 2 of Directive 1999/44/EC on consumer sales.

<sup>21</sup> Article 2(2) of Directive 99/44/EC on consumer sales.

<sup>22</sup> Joined Cases C-65/09 and C-87/09 Gebr. Weber GmbH v Jürgen Wittmer (C-65/09) and Ingrid Putz v Medianess Electronics GmbH (C-87/09) (2011) ECR I-05257.

*guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract”.*<sup>23</sup>

The consumer must be provided with the information by the trader, firstly, that s/he is protected by the legal guarantee, and secondly, about the content of the legal guarantee. Otherwise, the trader will breach not only the obligations defined by Directive 1999/44/EC, but also those established through and Directive 93/13/EEC on unfair contract terms, Directive 2005/29/EC on unfair commercial practices and Directive 2011/83/EU on consumer rights.

Directive 93/13/EEC on unfair contract terms imposes an imperative obligation to traders that all terms in consumer contracts have to be drafted in plain, intelligible language.<sup>24</sup> The transparency requirement in practice means that all Apple’s terms and conditions, including those related to the OYLW and the ACPP, have to be easily understandable to an average consumer.<sup>25</sup>

Directive 2005/29/EC on unfair commercial practices has introduced a mandatory hierarchical three-step mechanism for assessment of fairness of a trader’s commercial practice that competent authorities shall always use when assessing fairness of a commercial practice.

The provisions of Directive 2005/29/EC that Apple may be considered breaching with its commercial practices and improper information disclosure on legal and commercial guarantees include:

1. One of thirty-one practices which shall always be deemed unfair: *“Presenting rights given to consumers in law as a distinctive feature of the trader’s offer”*.<sup>26</sup> This rule would particularly apply in the case of the OYLW.
2. A form of misleading action: *“A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise: the consumer’s rights, including the right to replacement or reimbursement under Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, or the risks he may face”*.<sup>27</sup>
3. The rules on misleading omissions as defined by Directive 2005/29/EC on unfair commercial practices define that a form of unfair commercial practice will be the case when a trader omits to provide material information to the consumer. As material information is considered all information established through the consumer acquis, including thus the information requirement on legal and commercial guarantees provided by Directive 2011/83/EU.<sup>28</sup>

## Conclusions and recommendations

The present report on the Apple case provided an overview and examined the legality of the Apple official websites in fourteen European countries in relation to statutory and commercial guarantee. The main goal of the report was to obtain a complete picture of the manner in which the company Apple has modified its commercial practices as a result of the supra-national actions against Apple’s breach

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<sup>23</sup> Article 2(1)(14) of Directive 2011/83/EU on consumer rights.

<sup>24</sup> Articles 4 and 5 of Directive 93/13/EEC on unfair contract terms.

<sup>25</sup> Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* (2014) ECR I-0000.

<sup>26</sup> Annex I, point 10.

<sup>27</sup> Article 6(1)(g) of Directive 2005/29/EC on unfair commercial practices.

<sup>28</sup> Article 7(5) of Directive 2005/29/EC on unfair commercial practices.

of consumer legislation and whether the performed changes now fully secure the legality of Apple's business practices. In that sense, the scope of the report was limited only to Apple's commercial practices in relation to the legal and commercial guarantees.

As a general remark, the report has shown that Apple has indeed invested some efforts and accordingly modified its practices as a consequence of the pan-European action of consumer organisations. It is true that some progress has been made, but it seems that consumers are still not properly informed about their rights and the comparative advantages of the OYLW and the ACPP. Consequently, the additional efforts are required to clarify this ambiguousness. In particular, what needs to be clarified is how the consumer benefits from the ACPP over the legal guarantee. In addition, it has to be explained that the consumer will be well protected even if s/he decides not to buy the ACPP, i.e. that the ACPP is not a necessary prerequisite for consumers to be protected.

Moreover, it was possible to observe that the OYLW and, in particular, the ACPP do actually bring some additional rights to consumers compared to the ones secured through the legal guarantee, but that the amount and scope of these rights is smaller than in the rest of the world. This is the consequence of the common European system of consumer protection which provides an advanced statutory level of protection. Accordingly, consumers in the European Union must be informed about this.

The follow-up question to the made conclusions would relate to the proposition of the most suitable manner to provide information. In that sense, what seems to be the best possible option would be for Apple to first clearly explain that the imperative provisions of consumer legislation always provide mandatory protection to consumers for the period of two years (or longer, if applicable) and, subsequently, to illustrate what is basically meant by his right to conformity of acquired goods. A similar solution to the proposed one currently exists only in case of the Apple's website in Belgium.

As a result, the existing system of three paragraphs should be ideally kept, but with the modified text and approach. Accordingly, the first paragraph should preferably underline the existence of an already wide scope of protection secured by the national legislation and its absolute character, explaining briefly what is meant under the legal guarantee and what this means for a consumer in practice.

The explanation of the legal guarantee should always be followed by the second paragraph in which the OYLW and its benefits in comparison to the legal guarantee are explained. The provided benefits seem to be the same ones as those in case of the ACPP (listed below), but just with a different (shorter) period of validity and the fact that the OYLW is provided free of charge.

The third paragraph should provide all information regarding the ACPP that are relevant to consumers. Again, what needs to be taken care of is that consumers are not overloaded with information because in that case they will not benefit from it. Consequently, only important information should be explained. These pieces of information should relate, firstly, to the explanation of what the ACPP is and that it requires compensation. Secondly, the advantages in comparison to the statutory rights should be elaborated and what they offer to consumers in addition to what consumers are already granted through the legislative provisions of imperative character. The research has shown that those are, as Apple also informed BEUC:

1. the existence of telephonic technical support. Herein, it should be ensured that telephonic technical support is offered in the official language of the country where national Apple websites exist (otherwise, the lack of such a service would represent a form of unfair commercial practice);
2. the fact that in case of some products and in some countries (depending on whether a country has extended the period of two years), the ACPP provides longer protection (up to one year longer);
3. the fact that burden of proof will always remain with Apple and that it will not be transferred onto the consumer after expiry of the period of six months (or any longer period if envisaged so by a specific national consumer legislation);

4. the fact that the ACPP offers a geographically wider scope of application since it applies globally, so that consumers may contact any Apple store or retailer worldwide in case of any kind of defects. This also means that consumers may contact Apple directly irrespectively of whether Apple was the seller.

All these pieces of information should be provided in a clear, understandable and unambiguous manner. This approach is in line with the decision of the ECJ in *Ving Sverige*, where the Court clearly identified that consumers need to be provided with the fundamental information and may be given a possibility to access additional information.<sup>29</sup> A possibility for consumer to receive additional information on this should be given. On the webpage, ideally, consumers should find a table grid and the explanation of their rights. The grid should not be as the existing one, but should get modified. Three columns should remain, always referring to the national law in the first column, whereas when it comes to rows, i.e. the relevant categories of information for consumers, the following rows should be included:

1. the price
2. period of guarantee validity
3. geographical scope of coverage
4. on whom lies the burden of proof
5. telephone technical support

The table grid should always be followed by concise explanation of what is meant under each of the categories. In that sense, it is possible to observe that the proposed recommendation does not represent any of the existing approaches of Apple, but rather a combination of the elements of diverse approaches, followed by an appropriate material modification of the existing text. Only such a manner may guarantee that consumers will be provided with the right pieces of information in the appropriate manner, so that they can really follow it and thus fully understand what is meant under statutory rights, the OYLW and the ACPP, benefit from the information and make the right economic decisions. In addition to this, such an approach would also secure the legality of commercial practices of Apple in this area and alignment of its business practices with applicable consumer legislation.

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<sup>29</sup> Case C-122/10 *Konsumentombudsmannen (Ko) Ving Sverige AB*. (2011) 03903 at [59].









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